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Supreme Court, U.S.
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No. 00-1842

IN THE

Supreme Court of the United States

STATOIL ASA,

Petitioner,

v.

HEEREMAC V.O.F., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

James R. McGibbon
Teresa Wynn Roseborough
SUTHERLAND ASBILL &
BRENNAN LLP
999 Peachtree Street, NE
Atlanta, GA 30309

Jacob Dweck
Rebecca L. Hirsch
SUTHERLAND ASBILL &
BRENNAN LLP
1275 Pennsylvania Ave., NW
Washington, DC 20004

Seth P. Waxman
(Counsel of Record)
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Thomas C. Goldstein
THOMAS C. GOLDSTEIN, P.C.
4607 Asbury Place, NW
Washington, DC 20016

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14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
I. This Case Presents an Important and Unresolved Question of Federal Law Meriting Prompt Review. 1
II. The Substantial Confusion Surrounding the Question Presented Further Justifies this Court's Intervention. 5
III. The Fifth Circuit's Ruling Is Wrong on the Merits. 6
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

'In' Porters, S.A. v. *Hanes Printables*, 663 F. Supp. 494 (M.D.N.C. 1987) 5

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 9

Blue Shield of Va. v. *McCready*, 457 U.S. 465 (1982) 9

Braxton v. *United States*, 500 U.S. 344 (1991) 3

Caribbean Broadcasting System v. *Cable & Wireless PLC*, 148 F.3d 1080 (CADC 1998) 5

Empagran S.A. v. *F. Hoffman-La Roche, Ltd.*, No. 00-1686, 2001 WL 761360 (D.D.C. June 7, 2001) 4

Ferromin Int'l Trade Corp. v. *UCAR Int'l*, C.A. No. 99-693 (E.D. Pa. June 13, 2001) 4

Hartford Fire Insurance Co. v. *California*, 509 U.S. 764 (1993) 6, 8

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 9

In re Cooper Antitrust Litig. (*Metallgesellschaft AG* v. *Sumitomo Corp.*), 117 F. Supp. 2d 875 (W.D. Wis. 2000) 4, 5

In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702 (D. Md. 2001) 5

Kruman v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001) 4

Laker Airways v. *Sabena*, 731 F.2d 909 (CADC 1984) 6

Lantec, Inc. v. *Novell, Inc.*, No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905 (D. Utah Sept. 15, 2000) 4

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 7

Pfizer, Inc. v. *Government of India*, 434 U.S. 308 (1978) 1, 9

Transnor (Bermuda) Ltd. v. *BP North Am. Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990) 9

United Phosphorus, Ltd. v. *Angus Chemical Co.*, 131 F. Supp. 2d 1003 (N.D. Ill. 2001) 4, 5

Statutes

15 U.S.C. § 6a 1, 5, 6
15 U.S.C. § 7 9
15 U.S.C. § 12(a) 9
15 U.S.C. § 15(a) 9

Other Authorities

U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 277 (Feb. 2000) 3
U.S. Sentencing Guidelines Manual § 2R1.1 3

REPLY BRIEF FOR THE PETITIONER

In their Briefs in Opposition, respondents make three principal arguments. First, they contend that certiorari should not be granted because the Fifth Circuit's decision does not present a true "conflict" with the decisions cited by Statoil. Second, they argue that a finding of jurisdiction would be "breathtaking in scope," opening U.S. courts to a flood of foreign claims. Finally, they argue that the Fifth Circuit's decision is correct on the merits and thus is unworthy of Supreme Court attention. Respondents are mistaken on each of these points. Most significantly, they provide little or no response to Statoil's principal assertion: that the question presented is one of profound importance to U.S. antitrust enforcement and one that requires prompt and authoritative resolution.

I. This Case Presents an Important and Unresolved Question of Federal Law Meriting Prompt Review.

Respondents do not seriously dispute that this case presents an unresolved question of federal law with manifest importance for the application of the federal antitrust laws and thus the American economy. Respondents furthermore do not contest that this Court has repeatedly granted certiorari to resolve similar questions even in the absence of the disarray in the lower courts that is present in this case. See Pet. 16 n.4.

The Petition established that the Fifth Circuit's construction of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, would substantially narrow the Sherman Act's applicability to anticompetitive conduct that harms the U.S. economy. The FTAIA reflects Congress' view that jurisdiction under the Sherman Act should *not* be limited artificially to claims arising directly from effects in the United States. As this Court explained in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 315 (1978), in a discussion subsequently embraced by the Committee that framed the statute, see Pet. 17-18, when "potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators."

Far from contesting this point, respondents embrace it, albeit through their conclusory assertion that any result other than that reached below would turn the federal courts into the fora for resolving all competition claims around the world. That assertion is plainly incorrect, for the scope of the antitrust laws is limited to conduct that has a direct, substantial, and reasonably foreseeable anticompetitive effect in the United States. Conspiracies that harm foreign purchasers will meet this statutory test only when there is a unified conspiracy affecting a world-wide or regional market that encompasses the United States (rather than multiple conspiracies separately affecting distinct local or national markets). Where jurisdiction is present under this test, claims for injury suffered abroad can and generally will be consolidated with similar claims by U.S. victims of the conspiracy, with little or no additional burden on U.S. courts.

As the Petition explained, and respondents do not dispute, this case involves just such a conspiracy by respondents. Petitioner's claims arise from the integrated, world-wide market for the services of a very small number of barges. Respondents' conspiracy involved the agreement of the Saipem respondents to withdraw their ship from projects in U.S. waters as the *quid pro quo* for other producers' agreement to allocate to Saipem a high proportion of contracts at supra-competitive prices in the North Sea. Respondents' conduct thus had a direct, substantial, and foreseeable effect on U.S. commerce that was inextricably linked to the injury suffered by U.S. purchasers. Acknowledging jurisdiction on these facts will not open the federal courts to antitrust claims world-wide.

Respondents' further suggestion that such claims should be left to foreign competition laws was not embraced by Congress, and the better view is that comprehensive application of U.S. antitrust law *encourages* the development of international antitrust regimes. See Pet. 21 n.16. It is monumentally inefficient to split identical antitrust claims arising from the same anticompetitive conduct in the same world-wide market into separate actions in multiple jurisdictions – here, courts in the United States, nations bordering the North Sea, and various Asian nations. Such fragmentation of claims serves no purpose other

than to make it more difficult and expensive to pursue the remedies necessary to deter anticompetitive conduct and thereby protect the U.S. economy.

Respondents also essentially ignore that the decision below further undermines the antitrust laws by limiting the scope of *governmental* enforcement. McDermott's assertion (at 18) that the government may still "consider a defendant's worldwide sales in determining the seriousness of the defendant's role" is at the least highly doubtful under the language of the applicable Sentencing Guideline, which encompasses only "goods or services affected by the *violation*." U.S. Sentencing Guidelines Manual § 2R1.1(b)(2) (emphasis added). There cannot be any reasonable dispute that the government has a substantial stake in the proper disposition of the question presented. See generally Pet. 20-21 (describing numerous ongoing grand juries investigating international cartels); cf. U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 277 (Feb. 2000) (recommending "that federal, state, and local judges hearing private disputes that raise claims or defenses based on considerations of governmental policy invite concerned governments, including the U.S. Department of Justice, to submit their views at an early stage in the litigation").[1]

Respondents' oblique suggestion that the proper construction of Section 2 of the FTAIA should be resolved in another case that eventually will be presented to this Court is flawed as well. The FTAIA was adopted in 1982, yet the issue raised by the Petition remains mired in confusion. Given that the question presented turns on the meaning of at most two words – "a" and "conduct" – leaving the issue to percolate further in the lower courts would only cause the confusion to fester, while permitting respondents to escape substantial liability for what at least one of them has admitted in a guilty plea was anticompetitive con-

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[1] The federal government's ability to contest the Fifth Circuit's construction of the FTAIA in a criminal proceeding is questionable in light of this Court's general practice of not addressing disputes over the application of the Sentencing Guidelines. *Braxton* v. *United States*, 500 U.S. 344 (1991).

duct that harmed purchasers in the United States and abroad. Moreover, unlike this case, the other potential vehicles identified by respondents suffer from flaws that make it relatively unlikely that the Court would find it necessary to reach the proper construction of Section 2. In particular, none present so clearly as this case a unified, world-wide market that has been affected by a single conspiracy. And none present a situation in which the injury to domestic purchasers was inextricably linked to – and indeed was a *quid pro quo* for – the identical injury suffered by purchasers abroad.[2]

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[2] The cases cited by respondents generally involve claims arising in a distinct foreign market or conduct that did not have an effect on U.S. commerce. See *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1009 (N.D. Ill. 2001) (dispute over alleged anticompetitive scheme to prevent the manufacturing and sale of drugs in India; "the alleged conduct underlying Plaintiffs' claims can have had no effect on any United States commerce in the chemicals that Plaintiffs state they would have manufactured"); *Kruman* v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620, 625-26 (S.D.N.Y. 2001) (dispute over individual sales of art overseas; "it would be appropriate for the United States to provide remedies for injuries suffered in consequence of overt acts that occurred outside this country only if those acts, either individually or perhaps collectively, had direct, substantial and reasonably foreseeable effects here that caused the injuries to be remedied. That did not occur in this case."); *In re Copper Antitrust Litig.* (*Metallgesellschaft AG* v. *Sumitomo Corp.*), 117 F. Supp. 2d 875, 882, 886 (W.D. Wis. 2000) (*all* copper transactions alleged by plaintiffs occurred on London Metals Exchange and American markets were affected "only secondarily," such that "plaintiffs challenge conduct that involves trade or commerce on the LME, a *foreign* market" (emphasis added); "the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a *foreign* market even if the same defendants engage in price-fixing affecting an *American* market" (emphasis added)); *Lantec, Inc.* v. *Novell, Inc.*, No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905, at *14 (D. Utah Sept. 15, 2000) (plaintiffs' complaint "does not allege such an effect on domestic commerce, or facts from which such an effect on domestic commerce are shown"); *Empagran S.A.* v. *F. Hoffman-La Roche, Ltd.*, No. 00-1686, 2001 WL 761360, at *6 (D.D.C. June 7, 2001) (plaintiffs alleged a "worldwide *conspiracy*" in sale of vitamins, but did not allege existence of single, unified *market* for sales, which occurred in numerous countries (emphasis added)); *Ferromin Int'l Trade Corp.* v. *UCAR Int'l*, C.A. No. 99-693, Slip op. at 11 (E.D. Pa. June 13, 2001) (in antitrust complaint arising from sale of graphite electrodes, declining to permit "claims for damages suffered by foreign companies solely because of decreased competition and higher prices in *foreign markets*" (emphasis added)).

II. The Substantial Confusion Surrounding the Question Presented Further Justifies this Court's Intervention.

Although even the majority below acknowledged the substantial confusion that has long surrounded the international application of the Sherman Act, see Pet. 6, respondents deny it. Their attempt to distinguish the case law cited in the Petition, however, takes too narrow a view of the type of "conflict" that will justify review in this Court. It is the legal propositions adopted by other courts – not the facts of the individual cases on their most narrow construction – that matter. Congress enacted the FTAIA, first and foremost, to guide businesses' primary conduct. Importers and exporters reading the lower courts' varying constructions of Section 2 are subject to substantial uncertainty about what the statute means and the conduct in which they may lawfully engage. Even respondents (McDermott at 6; Saipem at 20) emphasize that Congress enacted the FTAIA precisely to promote clarity and certainty regarding the extraterritorial application of the Sherman Act.[3]

Respondents seek to distinguish the D.C. Circuit's decision in *Caribbean Broadcasting System* v. *Cable & Wireless PLC*, 148 F.3d 1080 (CADC 1998), on the ground that the plaintiff in that case had some customers in the United States. But the D.C. Circuit did not rely on that fact in holding that federal courts had jurisdiction over plaintiff's complaint under the FTAIA. Moreover, respondents (Saipem at 11-12) are simply wrong in deny-

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[3] Respondents are not correct in describing the application of Section 2 by district courts as uniform and clear. For example, the district court in *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Md. 2001), rejected the tests applied by two other district courts. *Id.* at 716 (declining to follow *'In' Porters, S.A.* v. *Hanes Printables*, 663 F. Supp. 494 (M.D.N.C. 1987), as too restrictive, and *In re Cooper Antitrust Litig.*, 117 F. Supp. 2d 875 (W.D. Wis. 2000), as too permissive of jurisdiction). In other respects, respondents mischaracterize the district court holdings they cite. The *Microsoft* opinion, for example, ultimately rested on antitrust standing, not Section 2. And the court's statement in *United Phosphorus* that "a foreign company cannot demonstrate the domestic injury requirement by 'piggy-backing' onto the injury of a United States exporter," was expressly limited to the FTAIA's proviso, which unlike Section 2 is limited to "injury to export business in the United States." See 131 F. Supp. 2d at 1008, 1019 (citation omitted).

ing that "*Caribbean* permitted the plaintiff to pursue *all* of its claims for damages," for that is precisely what the court did. The court of appeals held that the plaintiff's attempt to recover for damages arising out of lost sales to all customers in the Caribbean satisfied the FTAIA notwithstanding that most of its customers were located, and virtually all of defendants' exclusionary conduct took place, outside the U.S. See 148 F.3d at 1086 (court explains that market subject to petitioner's complaint was the Eastern Caribbean, only part of which is within U.S. jurisdiction). As the district court explained, the plaintiff's allegations reflected a "*de minimis*" connection to U.S. commerce. Pet. 24. *Caribbean* is irreconcilable with the Fifth Circuit's holding that a plaintiff may recover only for those injuries arising directly from U.S. commerce.[4]

Other courts of appeals, echoing this Court's decision in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 795-96 (1993), have continued to apply the "well established" rule that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Those courts read the FTAIA to require simply that the effect on U.S. commerce be anticompetitive. See Pet. 28. The Fifth Circuit's much more cabined view of Section 2 creates substantial uncertainty regarding whether particular activities fall within the prohibitions of the Sherman Act.

III. The Fifth Circuit's Ruling Is Wrong on the Merits.

Respondents address the merits, essentially arguing that there is no need for the Court to grant certiorari because the case was correctly decided under the FTAIA. Their arguments fail to address the basic structure, language, and legislative history of the statute. As Statoil demonstrated in its Petition, Section 1 of

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[4] The Fifth Circuit's position furthermore rests on the view that the FTAIA for the first time imposed a requirement under the Sherman Act that the plaintiffs' injury arise from an effect in U.S. commerce. But respondents have no answer to the fact that the D.C. Circuit, by contrast, recognized in *Laker Airways* v. *Sabena*, 731 F.2d 909, 946 n.137 (CADC 1984), that the FTAIA "did not change . . . the application of antitrust laws to conduct producing the requisite effect in the United States territory."

the FTAIA established jurisdiction in all cases in which the defendants' *conduct* has a direct, substantial, and reasonably foreseeable effect on U.S. commerce. The unlawful conduct that had such effect is not, as respondents would have it, specific transactions in either the North Sea or the Gulf of Mexico. Rather, the conduct, as alleged in Statoil's complaint, was respondents' unified conspiracy to allocate and fix prices in a single world-wide market for heavy lift services. Even the court below acknowledged that this conduct had the requisite effect in the United States (Pet. App. 13a; see also *id.* 5a-6a), and this conduct is indisputably subject to the U.S. antitrust laws. Indeed, this conspiracy has resulted in a criminal antitrust conviction of one of the respondents.

The sole remaining question under the FTAIA is whether Section 2 precludes jurisdiction over claims of particular plaintiffs arising from respondents' unlawful conspiracy. It does not. Section 2's requirement that the domestic effect of the conduct must give rise to "a claim" under the antitrust laws reflects Congress' manifest purpose, recorded in the legislative history, to preclude jurisdiction when the effects felt in this country are not anticompetitive.[5] Thus, Section 2 does not impair in any way the ability of foreign parties to recover for anticompetitive conduct that also harmed U.S. consumers. Indeed, the legislative history, as quoted in all parties' papers in this action, demonstrates congressional concern that the U.S. antitrust laws should broadly provide a remedy to all those injured by conduct that has the requisite adverse effect in this country so as to assure adequate deterrence and protect U.S. consumers. The proviso at the end of the FTAIA reflects this concern, by limiting foreign antitrust claims arising out of exports, but doing so solely in those cases in which the "only" effect in this country is on export

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[5] Such was the case, for example, in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). There, a conspiracy to fix prices in Japan may have had the effect of causing Japanese producers to charge lower prices in the U.S. as a means of disposing of excess output. Despite this (benign) effect in the U.S., American competitors could not recover in the absence of a showing of anticompetitive effect in the U.S.

commerce – *i.e.*, when the conduct has no effect on U.S. domestic or import commerce.

Respondents also suggest two alternative grounds on which, they assert, the judgment below might be supported. They are mistaken in each regard. First, respondents argue that the Sherman Act itself, apart from the FTAIA, limits jurisdiction because it applies only to commerce "with foreign nations" and not to commerce between or among foreign nations. See Saipem at 14-15. Respondents characterize Statoil's claim as one for unlawful charging of high prices on particular transactions in the North Sea, and they argue that the Sherman Act provides no underlying jurisdiction because the commerce involved is between foreign nations.

This reasoning is wrong for the same reason that respondents' analysis of the FTAIA is wrong. The Sherman Act outlaws *conduct* – specifically "[e]very contract, combination . . . , or conspiracy" that restrains U.S. domestic commerce or commerce with foreign nations.[6] Here, it is clear that respondents' unlawful conspiracy had the requisite effect on U.S. domestic commerce in the Gulf of Mexico, and the Sherman Act by its terms thus clearly applies to outlaw this conduct.

Alternatively, respondents argue (Saipem at 28-29) that Statoil and other foreign purchasers lack standing to assert their claims. This argument too is wrong and was effectively rebutted by Judge Higginbotham in his dissent, without contradiction by the majority. See Pet. App. 35a-36a.[7]

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[6] In *Hartford Fire*, the Court similarly treated the conspiracy as the conduct that must cause domestic harm for jurisdiction to apply. "[I]t is well established by now that the Sherman Act applies to foreign *conduct* that was meant to produce and did in fact produce some substantial effect in the United States. . . . Such is the *conduct* alleged here: that the London reinsurers engaged in *unlawful conspiracies* to affect the market for insurance in the United States and that their conduct in fact produced substantial effect." 509 U.S. at 795-96 (citations omitted; emphasis added).

[7] The panel majority made no independent ruling on standing, holding merely that because the FTAIA deprived the federal courts of subject matter jurisdiction over petitioner's claim, petitioner necessarily lacked antitrust standing. Pet. App. 3a, 22a n.32.

Section 4 of the Clayton Act provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." 15 U.S.C. § 15(a).[8] Statoil, as a direct purchaser of the defendants' heavy lift services, falls within this defined class of persons. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (direct purchasers suing for overcharges have standing to sue); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982) (same). Moreover, Statoil has sustained injury in the form of overcharges of the kind the antitrust laws were meant to forestall – *i.e.*, a loss that "stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990). Accordingly, Statoil clearly has standing under established judicial standards.

At base, respondents' argument is circular. Plaintiffs should not have standing to sue for claims arising overseas, respondents contend, because the antitrust laws are not intended to provide a remedy for plaintiffs suing for claims arising overseas. This is simply not the law. See, *e.g.*, *Pfizer*, 434 U.S. at 315 (where a conspiracy "operated domestically as well as internationally," foreign plaintiffs must be allowed to recover for damages related to profits unlawfully "extort[ed] abroad," so as to assure adequate deterrence to protect American consumers); *Transnor (Bermuda) Ltd.* v. *BP North Am. Petroleum*, 738 F. Supp. 1472 (S.D.N.Y. 1990) (overseas purchaser suing for damages suffered in connection with its purchase of crude oil in London for delivery from the North Sea to Scotland had standing to sue because purchases were made in a unified trading market that included U.S. as well as overseas transactions and the alleged conspiracy harmed purchasers in this country as well). Statoil similarly has standing to pursue claims for damages suffered as the direct result of respondents' unlawful world-wide cartel.

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[8] A "person" is further defined in the Sherman and Clayton Acts as including "corporations and associations existing under or authorized by the laws of . . . any foreign country." 15 U.S.C. §§ 7, 12(a). See also *Pfizer*, 434 U.S. at 320 (stating that a foreign corporation is entitled to sue under the statute and holding that a foreign nation is similarly entitled to sue).

* * * *

The statutory question presented in this Petition is of manifest importance to U.S. antitrust enforcement for both private parties and the federal government. Its resolution has confounded the federal courts, leaving the law, in Judge Higginbotham's words, "a muddled mess." Pet. App. 55a. The question presented is both straightforward and cleanly presented – requiring the Court to explicate the meaning of at most two statutory phrases in the context of a case involving a unified, world-wide market subverted by a single conspiracy. No better vehicle for resolving the question presented is likely ever to arise. Deferral will only exacerbate the confusion that Congress sought to eliminate when it adopted the FTAIA but that both the lower courts and the business community continue to face.

CONCLUSION

For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

James R. McGibbon
Teresa Wynn Roseborough
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Atlanta, GA 30309

Jacob Dweck
Rebecca L. Hirsch
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., NW
Washington, DC 20004

Seth P. Waxman
(Counsel of Record)
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Thomas C. Goldstein
THOMAS C. GOLDSTEIN, P.C.
4607 Asbury Place, NW
Washington, DC 20016

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